In the Supreme Court
of the United States

OCTOBER TERM, 1975

No. 75-1049

BARBARA R. HUTCHISON,

Petitioner,

v.

LAKE OSWEGO SCHOOL DISTRICT NO. 7, DR. THOMAS COTTLE, EDWARD ALLEN, SAMUEL H. MELROSE, JR., GARRY R. BULLARD and JAMES S. PUTNAM, in their capacities as members of the LAKE OSWEGO SCHOOL DISTRICT BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Plaintiff Barbara R. Hutchison prays for a writ of certiorari to review the Order on Attorney's Fees and Costs entered by the United States Court of Appeals for the Ninth Circuit in this case on October 29, 1975.

The defendants have filed a petition for a writ of certiorari in No. 75-568 to review the judgment of the Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District Court is reported at 374 F. Supp. 1056, and is set out in Appendix A, infra, pp. 1a-21a. The opinion of the Court of Appeals is reported at 519 F.2d 961, and is set out in Appendix B, infra, pp. 22a-33a. The Court of Appeals' Order on Attorney's Fees and Costs is set out in Appendix F, infra, pp. 40a-41a.

JURISDICTION

The Order on Attorney's Fees and Costs was entered on October 29, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where a plaintiff in an employment discrimination suit under Title VII of the Civil Rights Act of 1964 has prevailed in the District Court, and the judgment of a violation of Title VII has been affirmed by the Court of Appeals, is it proper for the Court of Appeals to deny an award of attorney fees and costs

to the successful plaintiff and to award costs against her?

STATUTE INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(k), provides as follows:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

STATEMENT OF THE CASE

Lake Oswego School District No. 7 (School District) is a public school district in Lake Oswego, Oregon. School District has a sick leave plan which provides sick leave for "illness or injury" of employees. The plan covers absences resulting from disabling complications of pregnancy and abnormal pregnancies, but does not cover absences attributable to normal pregnancy and childbirth.

Petitioner was employed as a part-time teacher at one of School

District's junior high schools. In 1973 she gave birth to a child, resulting in temporary absence from her work for 15 working days. After she returned to work she requested sick leave benefits for her absence. Her request was denied on the ground that pregnancy was not an "illness or injury" but a temporary disability permitting leave without pay.

Petitioner filed charges with the Equal Employment Opportunity Commission (EEOC), claiming that the School District had discriminated against her because of her sex. After receipt of a right-to-sue letter from EEOC, she brought this action in the district court seeking a declaratory judgment, an injunction and damages against School District and the school board under Title VII and the Equal Protection Clause of the Fourteenth Amendment.

The district court dismissed the School District on the basis of sovereign immunity, but found that the school board and its individual members had engaged in unlawful sex discrimination in violation of both the Equal Protection Clause and Title VII. The district court enjoined the school board

from refusing to grant sick leave pay for pregnancy-related disabilities and ordered judgment against the school board for petitioner's lost wages, attorneys' fees and costs.

Respondents appealed from the district court's rulings that they had violated Title VII and the Equal Protection clause, and that the individual defendants were not shielded from liability by virtue of official immunity. Petitioner cross-appealed from the district court's ruling that her claim against the School District was barred by the Eleventh Amendment.

The Court of Appeals affirmed the ruling that the School District's plan violated Title VII,[1] but reversed the ruling that it violated the Equal Protection Clause. It reversed the ruling that the individual defendants were not immune, and it reversed the ruling that the School District was immune. Based on these rulings, the Court of Appeals directed that judgment be entered in favor of

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1/ Defendants' petition for a writ of certiorari in No. 75-568 is directed at this ruling that the Plan violated Title VII.

petitioner and against the School District and the school board, jointly and severally, for back pay, costs, and attorney fees. (Appendix A, infra, p. 32a.) The judgment of the Court of Appeals was entered on July 21, 1975. (Appendix C, infra, p. 34a.) Petitioner then filed her timely Request for Attorney Fees, with supporting affidavit (Appendix D, infra, pp. 35a-37a), and her timely Cost Bill (Appendix E, infra, pp. 38a-39a). Respondents also filed a Cost Bill. On October 29, 1975, the Court of Appeals entered its Order on Attorney's Fees and Costs (Appendix F, infra, pp. 40a-41a), in which it denied petitioner's requests for costs and attorney's fees and awarded costs to respondents.

REASONS FOR GRANTING THE WRIT

1. The purposes of Title VII are frustrated where successful plaintiffs are denied attorney's fees.

The primary responsibility for enforcing the public purposes of Title VII of the 1964 Civil Rights Act lies in the hands of private litigants, just as it does for Title II. See, for example, Air Line Stewards v. American Airlines, Inc., 455 F.2d 101, 107 (7th Cir 1972)

(Title VII); and cf. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (Title II). In Piggie Park, this Court considered an attorney fee provision in Title II virtually identical to the provision in Title VII involved here. The Court there held that despite the fact that the award of attorney fees was entrusted by statute to the court's "discretion," an award of such fees should "ordinarily" be made to a plaintiff who succeeds in obtaining injunctive relief under the statute. 390 U.S. at 402.

In Albemarle Paper Company v. Moody, 422 U.S. 405 (1975), this Court noted "the great public interest in having injunctive actions brought" under Title II, and declared that "[t]here is of course an equally strong public interest in having injunctive actions brought under Title VII." The Court then implied that the Piggie Park standard for the award of attorney fees in a Title II case should be applied with equal force in a Title VII case. 422 U.S. at 415.

In this case, petitioner obtained injunctive relief to enforce her, and the public's, Title VII rights, and the award of that relief was affirmed on

appeal -- yet the Court of Appeals denied an award of attorney fees. The decision is contrary to the Piggie Park rationale, as interpreted in Albemarle Paper, and this Court should review the decision to resolve any question about the applicability of Piggie Park in the Title VII context.

2. There is a conflict among the Circuits as to the proper standard for the award of attorney fees in Title VII cases.

In Albemarle Paper, this Court granted certiorari "because of an evident Circuit conflict as to the standards governing awards of backpay" in a Title VII action. 422 U.S. at 413. Awards of attorney fees under Title VII, like awards of backpay, are committed to the "discretion" of the court, and similarly conflicting standards have arisen among the Circuits as to the standards for their award. For example, compare the denial of fees in this case with the liberal attitude expressed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 719-720 (5th Cir 1974), followed in Evans v. Sheraton Park Hotel, 503 F.2d 177, 187-188 (D.C. Cir. 1974). See also

Lowry v. Whitaker Cable Corp., 472 F.2d 1210 (8th Cir. 1973), where the court specifically held that a successful Title VII plaintiff was entitled to attorney fees on appeal.

The uncertainty in this area is further illustrated by the recent action of another panel of the Ninth Circuit in Berg v. Richmond Unified School Dist., 10 E.P.D. ¶10,553, 11 F.E.P. Cases 1285 (9th Cir. 1975). That case was substantially identical to the instant case: it involved an appeal by a school district from a ruling that its denial of sick leave benefits to a teacher for a pregnancy-related absence violated Title VII. On December 9, 1975, the Berg panel affirmed that ruling, noting that the question had already been resolved against the school district by the decision in the instant case. Ironically, the panel then awarded the teacher $1,500 for her attorney fees on appeal, whereas the teacher in this case -- which had established the law of the circuit -- had been awarded nothing.

For reasons substantially identical to the reasons which led to the grant of the writ in Albemarle Paper, therefore, this Court should grant

certiorari and establish definitive standards for attorney fees in Title VII as it has done for Title II.

3. The decision below wrongly interprets "prevailing party" and unfairly penalizes the plaintiff for asserting more than one theory in her complaint.

In awarding costs to the defendants on appeal, the Court of Appeals must have considered the defendants to be the "prevailing party," since under the terms of the statute, 42 U.S.C. §2000e-5(k), costs may be awarded only to the prevailing party. The fact is, however, that in the district court the plaintiff obtained an injunction against the defendants and an award of back pay, costs and attorney fees, and all of these elements of relief were affirmed by the Court of Appeals.

The fact that the Court of Appeals reversed the District Court on three of its legal conclusions is irrelevant (one of these reversals was in plaintiff's favor, while the other two were in defendants' favor), for the critical fact is that the judgment for plaintiff on her Title VII claim was affirmed, and the practical outcome of the case was the same following the

Court of Appeals decision as it had been following the District Court decision. Certainly the defendants seemed to consider plaintiff the prevailing party, for they have filed a petition for certiorari (No. 75-568), contending that the Court of Appeals decision on Title VII was wrong and asking this Court to review it.

The award of costs against plaintiff thus ignores the realities of who "prevailed" in the Court of Appeals, and it unfairly penalizes the plaintiff for asserting in good faith an equal protection theory as well as a Title VII theory. "*** [T]he policy underlying the fee provisions of Title VII is best served by encouraging plaintiffs to seek the broadest relief they feel, in good faith, that they are entitled to." Palmer v. Rogers, 10 E.P.D. ¶10,499, at p. 6130 (D. D.C. 1975).

There is thus a conflict as to the proper interpretation of the "prevailing party" in Title VII cases so as to justify an award of costs, and the decision of the Court of Appeals should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the order of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

BARBARA R. HUTCHISON, Plaintiff,
v.
LAKE OSWEGO SCHOOL DISTRICT
No. 7 et al., Defendants.
Civ. No. 73-339.

United States District Court,
D. Oregon

April 25, 1974.

OPINION

SKOPIL, District Judge:

I.

NATURE OF THE ACTION

This is an action for a declaratory judgment and damages for defendants' failure to permit plaintiff to apply her accumulated sick leave to childbirth-caused incapacity. Plaintiff seeks relief under Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e et seq.) and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 2000e et seq.

III.

FACTS

From September, 1971 to June, 1973, plaintiff, Barbara R. Hutchison, was employed by defendant Lake Oswego School District No. 7 as a part-time teacher of social studies at Waluga Junior High School.

Defendant Lake Oswego School District No. 7 (hereinafter "School District") is a school district created by the State of Oregon pursuant to the Constitution and statutory law of the State of Oregon.

Defendants Cottle, Allen, Melrose, Bullard, and Putnam are duly elected members of the Board of Education of defendant School District.

During July or August of 1972, plaintiff informed Dale Reynolds, principal of Waluga Junior High School, that she was pregnant and would be absent for approximately three weeks with the birth of her child.

On January 27, 1973, the child was born. From January 29, 1973, through February 16, 1973, a period of fifteen and one-half working days, plaintiff was absent from her employment. During this period she was unable to work.

At the time of childbirth, plaintiff had accrued fifteen and one-half days sick leave. When she returned to her employment, she requested that she be allowed to use her accumulated sick leave for her absence. Lloyd F. Millhollen, Superintendent of Schools, Lake Oswego Public Schools, denied her request. Dr.

Millhollen's denial was affirmed by the defendant board members.

The Policies and Procedures of Lake Oswego School District No. 7 allow sick leave only for "illness or injury". The School District has determined that normal childbirth is not an "illness or injury". Plaintiff was not permitted to draw pay from her accrued sick leave. The sum of $339.59 was deducted from her wages because of her absence and the necessity to hire a replacement during that absence.

On March 14, 1973, plaintiff filed with the Equal Employment Opportunity Commission (EEOC) a charge that defendants had discriminated against her because of her sex. On April 26, 1973, the EEOC notified plaintiff that she could, within ninety days, commence a civil action. On May 2, 1973, the present action was filed.

Plaintiff contends that defendants' refusal to allow her to apply her accrued sick leave is an unlawful employment practice within the meaning of 42 U.S.C. § 2000e-2. It distinguishes between childbirth-caused disabilities and all other medical disabilities, discriminating against her on the basis of sex. Plaintiff asserts that defendants' use of this distinction for the purpose of determining employment benefits is an arbitrary classification. It denies plaintiff equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

IV.

JURISDICTION OVER DEFENDANTS

1) *Title VII Claims.*

Defendants Cottle, Allen, Melrose, Bullard, and Putnam assert that as members of the Lake Oswego School District Board they are not employers within the meaning of 42 U.S.C. § 2000e-2(a). They contend that plaintiff's only employer was the School District.

Section 2000e(b) defines "employer" as a person engaged in an industry affecting commerce who has fifteen or more employees, and any agent of such a person. Section 2000e(a), in part, defines "person" as one or more individuals, governments, or political subdivisions.

As enacted, Title VII applied only to private employers. In 1972 it was amended to promote equal employment opportunities by extending coverage to state and municipal employees and educational institutions. 42 U.S.C. § 2000e(a), Public Law 92-261, 86 Stat. 103, March 24, 1972. Title VII applies to school teachers in public schools. LaFleur v. Cleveland Board of Education, 465 F.2d 1184, 1186 (6th Cir. 1972), aff'd 414 U.S. 632, 94 S. Ct. 791, 39 L.Ed.2d 52 (1974).

The power to hire lies with the School Board under the provisions of ORS 342.505:

> ". . . the district school board, at a general or special meeting called for that purpose, may hire teachers and shall record such action in the minutes. . . ."

ORS 332.505 provides that a district school board may:

> "(2) Employ principals, teachers, . . . and define the duties, terms and conditions of employment and fix the compensation.
>
> "(3) Compensate district employees in any form which may include, but shall not be limited to, insurance, tuition reimbursement, and salaries."

Defendant School District is an employer within the meaning of 42 U.S.C. § 2000e. The School Board members are the agents of the School District and thus are employers. The School District is immune from suit under the doctrine of sovereign immunity. This immunity does not extend to the remaining defendants for acts which were unconstitutional or beyond their statutory powers. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1948). Officials are not entitled to absolute immunity. They are entitled to a limited or a qualified immunity for acts done by them in good faith and within the scope of their official duties. Bennett v. Gravelle, 323 F. Supp. 203, 213 (D.C. Md. 1971), aff'd, 451 F.2d 1011 (4th Cir. 1971). However, where discrimination is practiced, good faith and the discretionary exception cannot be interjected as defenses. A successful defense on the merits merges with a successful defense under the qualified-immunity doctrine. McLaughlin v. Tilendis, 398 F.2d 287, 291 (7th Cir. 1968). To hold otherwise would thwart the intent and purpose of Title VII.

2) *Equal Protection Claims.*

The defendants seek dismissal. They contend they are immune from suit under the Equal Protection Clause of the Fourteenth Amendment. They also maintain that plaintiff has asserted a denial of equal protection under the Civil Rights Act of 1971, 42 U.S.C. § 1983, and that the School District is not a person within the meaning of § 1983.

Under the doctrine of sovereign immunity, the defendant School District is immune from suit. It is unnecessary for me to consider whether the School District is a person within the meaning of § 1983. Furthermore, plaintiff has not asserted a claim under § 1983. It would be improper to extend plaintiff's Complaint to resolve this issue in the manner sought by defendants.

Sovereign immunity will not be extended to the remaining defendants for acts which were unconstitutional or beyond their statutory powers. Larson v. Domestic and Foreign Commerce Corp., *supra.*

V.

TITLE VII CLAIMS

The sick-leave provisions of the School District are not in dispute. The question presented is the application of Title VII to these facts.

"Sick leave" is defined in ORS 342.595(1)(a) as "absence from duty because of a teacher's illness or injury".

Section 415 of the Policies and Procedures of the

School District describes leaves of absence. Section 415.1 provides:

> "Sick leave is to be used only at the time of illness or injury of the employee."

The School District provides for maternity leave in § 415.3:

> "Maternity leave-of-absence may be granted to a permanent teacher. Requests for leave shall be made within the first three months of pregnancy. The teacher may be asked to begin such leave at any time during the pregnancy as determined by the building principal, after consultation with a representative of the superintendent and the attending physician."

The School District determined that pregnancy or childbirth is not an "illness or injury". The School Board was guided by ORS 342.595(1)(a). It also obtained an opinion on state maternity and sick-leave policies from Milt Baum, Director of Legal and Executive Services for the Oregon State Department of Education. The School District was advised that the Oregon law does not include maternity within the definition of "illness or injury".

In contrast, we must consider 42 U.S.C. § 2000e 2(a):

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex, . . . or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex, . . ."

The United States Equal Employment Opportunity Commission, the administrative body created by Title VII, has issued guidelines which provide that the separate treatment of maternity disability from other temporary disabilities is prohibited as discrimination on the basis of sex.

29 C.F.R. § 1604.10 Employment policies relating to pregnancy and childbirth.

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

29 C.F.R. § 1604.9 Fringe benefits.

"(a) 'Fringe benefits', as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

"(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits."

EEOC guidelines, while not law, are entitled to "great deference" by the courts. Phillips v. Martin Marietta Corp., 400 U.S. 542, 545, 91 S. Ct. 496, 27 L.Ed.2d 613 (1970); Griggs v. Duke Power Co., 401 U.S. 424, 434, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971).

The guidelines were applied in the case of Naran Andreev v. National Broadcasting Co., CCH EEOC Decisions 1973, ¶ 6380. It was held that the condition of pregnancy must be treated the same as any other illness. The EEOC held that the employer's sick-leave policy was an unfair labor practice under Title VII because it differentiated between maternity leave and other kinds of temporary disabilities.

State and local governments and educational institutions were exempt from Title VII until 1972. Consequently there are few Title VII cases involving pregnancy. The question has arisen frequently, however, in cases claiming a denial of equal protection or a denial of civil rights under color of law. Title VII standards are more compelling because they place a statutory mandate upon the employer. Thus, while a

fixed policy of classification may survive an equal-protection attack, it may still violate Title VII. Wetzel v. Liberty Mutual Ins. Co., 372 F. Supp. 1146, 7 FEP Cases 34 (W.D.Pa. 1974); Schattman v. Texas Employment Commission, 459 F.2d 32 (5th Cir. 1973), cert. den., 409 U.S. 1107, 93 S.Ct. 901, 34 L.Ed.2d 688 (1973), reh.. den., 410 U.S. 959, 93 S.Ct. 1414, 35 L.Ed.2d 695 (1973). The most recent Equal Protection Clause cases dealing with pregnancy do provide some assistance.

The following defenses to plaintiff's Title VII claim are asserted: (1) plaintiff must show dissimilar treatment of persons similarly situated, (2) pregnancy is *sui generis*, (3) pregnancy is voluntary, (4) the maternity sick-leave policy does not apply to women in an area in which they compete with men, and (5) benefits could not be fairly awarded because of the varying lengths of incapacity among women due to childbirth. Defendants cite Cohen v. Chesterfield County School Board, 474 F.2d 395 (4th Cir. 1973). This case has been reversed at 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974). They also rely on EEOC Dec. No. 70-360 (1969), CCH Emp. Prac. Guide 6084, and EEOC Opinion Letter, November 15, 1966. Both have been nullified by the guidelines enacted by EEOC in 1972 and reported at 29 C.F.R. § 1604, et seq.

The defenses proposed by defendants are not valid defenses to a Title VII action. However, they may be asserted as defenses to a claim under the Equal Protection Clause. They will be discussed at the appropriate time.

VI.

EQUAL PROTECTION CLAUSE

Plaintiff contends that, in determining employment benefits, the distinction between childbirth-caused disabilities and all other medical disabilities is an arbitrary and discriminatory classificaton on the basis of sex and denies her equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

The threshold issue is the standard of review to be applied to test the validity of the Board's classification. Although the Supreme Court has considered the question in recent cases, Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), and Reed v. Reed, 404 U.S. 71, 92 S.Ct. 23, 30 L.Ed.2d 156 (1971), it remains unclear how sex discrimination fits within the equal-protection doctrine. In *Frontiero* the four members of the Court were willing to hold that sex is a "suspect" classification. However, the majority refused to put sex in this category. In *LaFleur*, the most recent decision, the Court reverted to the standard of "rational relationship to a valid state interest". I similarly do not consider whether sex is a "suspect" classification. The challenged classification is invalid even under the *Reed* test. This test requires the court to scrutinize challenged legislation or administrative classification. The classification must be "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the

object of the legislation." Reed v. Reed, *supra* at 76. See also Aiello v. Hansen, 359 F. Supp. 792 (N.D.Cal. 1973).

The effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program. The question whether the exclusion of pregnancy-related disabilities from the program is arbitrary or rational depends upon whether pregnancy and pregnancy-related illness substantially differ from the included disabilities.

When any group of citizens are classified and receive treatment different from the rest,

> "The Equal Protection Clause requires more of a state law than non-discriminatory application within the class it establishes. McLaughlin v. Florida, 379 U.S. 184, 189-190 [85 S.Ct. 283, 286, 13 L.Ed.2d 222] (1964). It also imposes a requirement of some rationality in the nature of the class singled out.
>
> * * * * *
>
> "But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" (citations omitted) Rinaldi v. Yeager, 384 U.S. 305, 308-309, 86 S.Ct. 1497, 1499-1500, 16 L.Ed 2d 577 (1966).

The purpose of the program is not reflected in the legislative history. Sick leave is to compensate teachers for the wage loss they sustain by being unable to

work because of illness or injury. This is the only purpose which can be deduced from the statutes. The exclusion of childbirth-related disabilities does not promote this purpose. The economic hardship pregnant women suffer when they cannot work is identical to the hardship of other disabled workers. See generally Aiello v. Hansen, *supra*.

The Sixth Circuit discussed the reality of the situation in LaFleur v. Cleveland Board of Education, *supra*:

> "Here, too, we deal with a rule which is inherently based upon a classification by sex. Male teachers are not subject to pregnancy, but they are subect to many types of illnesses and disabilities. This record indicates clearly that pregnant women teachers have been singled out for unconstitutionally unequal restrictions upon their employment. Additionally, as we have observed, the rule is clearly arbitrary and unreasonable in its overbreadth." 465 F.2d at 1188.

Regulations based on sexual classifications should be invalidated unless supported by a valid state interest. Reed v. Reed, *supra*. The denial of sick-leave benefits to women teachers suffering from childbirth-caused disabilities has no relation to the employer's interest.

I am faced with substantially the same situation as the Court in Wetzel v. Liberty Mutual Ins. Co., *supra*. I agree with the Court's holding.

> "Pregnancy is the only disability not within the other exceptions, not covered by the Income Protection Plan. Pregnancy is a condition limited

to women. Conditions limited to men, such as prostate troubles, are not excluded, nor is any exclusion provided for a number of illnesses whose incidence among males is greatly predominant (i. e. gout 19 to 1; the Merck Manual, 10th ed. 1961).

* * * * *

"We must emphasize the distinction made by the guidelines, § 1604.10(b) that it is 'disabilities caused or contributed by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom,' which for job-related purposes are to be treated as temporary disabilities. They do not cover leave for child rearing, but only for job disability. No evidence has been presented to us by Defendant as to the average duration of pregnancy disability. Again, we have a difficult time in freeing ourselves from stereotype thinking. . . . We may assume from a general knowledge of the conditions of life, that in the normal or usual pregnancy, the period of disability will be relatively short. There is nothing in this record to show, and nothing in our general experience with life indicates that the job-related incidents of disability for pregnancy is any greater or any less than that for a prostatectomy." 7 FEB Cases at p. 47.

The Board has failed to differentiate pregnancy from other temporarily debilitating conditions. Pregnancy creates less of an administrative problem than do truly unexpected accidents or illness. Heath v. Westerville Board of Education, 345 F.Supp. 501 (S. D.Ohio E.D. 1972). I agree with the District Court's holding in Cohen v. Chesterfield County School Board, 326 F.Supp. 1159, 1161 (E.D.Va. 1971), aff'd, 474

F.2d 395 (4th Cir. 1973), aff'd., 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974). The sick-leave policy of defendant School Board members:

> ". . . denies pregnant women such as [plaintiff] equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the [Equal Protection Clause of the Fourteenth Amendment to the United States Constitution]." 326 F.Supp. at 1161.

Sexual stereotypes are no less invidious than racial or religious ones.

> "Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 [92 S.Ct. 1400, 1407, 13 L.Ed.2d 768] (1972)." *Frontiero*, 411 U.S. at 686, 93 S.Ct. at 1770, 36 L.Ed.2d at 591.

Defendants argue that their policies are not sexually discriminatory because pregnancy and maternity are *sui generis* and the School District's notice of them is not an invidious classification by sex. They state that "pregnancy is usually voluntary" and thus is not an illness or injury within the scope of ORS 342.595(1)(a).

I disagree with defendants' arguments. Judge Weber, in his opinion in Wetzel v. Liberty Mutual Ins. Co., *supra*, stated:

> "Pregnancy is a natural condition, it is an an expectable condition, it is a statistically foreseeable condition, and ultimately it is a necessary condition. It is a condition limited to women, not by statutory law or custom, but by biological law. If three-eighths of our employee working force consists of women, and their age group necessarily overlaps in large measure the childbearing age group, pregnancy is certain to occur in a statistically expectable number of employees. . . .
>
> "Because pregnancy is a natural, expectable, and societally necessary condition, which is certain to occur in a statistically predictable number of women in the labor force, we see no merit in Defendant's argument that it may be excluded from equality of treatment in conditions and benefits of employment because it is a voluntary condition. Whether voluntary or not, it occurs with certainty and regularity. . . ." 7 FEB Cases at 44.

The regulation penalizes the female school teacher for being a woman and must be condemned on that ground.

The classification also discriminates because it requires the plaintiff to choose between employment and pregnancy. Plaintiff's interest in having children is a right entitled to the protection of the Fourteenth Amendment. Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); Buckley v. Coyle Public School System, 476 F.2d 92 (10th Cir. 1973). *Wetzel, supra* at 45.

VII

COSTS

It has been urged that the administrative burden and cost of providing sick-leave benefits for pregnancy-related disabilities provides a justification for denying these benefits. This is not a defense to a Title VII action. 29 C.F.R. § 1604.9(e) provides:

> "(e) It shall not be a defense under Title VIII [sic] to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

The problem was considered in Aiello v. Hansen, *supra*. The Court held:

> "Clearly it is a legitimate interest for a state to attempt to preserve the fiscal integrity of its programs. [citations omitted] More particularly, a state may properly seek to make a program self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large. [citations omitted] 'But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.' [citations omitted] Thus, the fact that excluding pregnancy-related disabilities saves costs is only the first step; the state also must show that the exclusion of pregnancy-related disabilities rests upon some ground of difference having a fair and substantial relation to the object of the legislation.
>
> "• • • • •
>
> "The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program. . . .

"Moreover, regardless of the effect the inclusion of pregnancy-related disabilities would have, these disabilities cannot be excluded merely because the cost of including the entire group might be prohibitive. While some women suffering pregnancy-related disabilities will have large claims, not all pregnant women will.

"* * * * *

"Similarly, by excluding all pregnancy-related disabilities on the grounds that these claims will be large, the state denies pregnant women benefits on the basis of generalities and stereotypes contrary to the requirements of the equal protection clause.

"Like the forced maternity leave in *Heath*, the denial of benefits for pregnancy-related disabilities seems to have its roots in the belief that all pregnant women are incapable of work for long periods of time, and therefore, they will submit large disability claims. The truth of this belief is certainly suspect. As the *Heath* court pointed out, the treatment of pregnancy in other cultures shows that much of our society's views concerning the debilitating effects of pregnancy are more a response to cultural sex-role conditioning than a response to medical fact and necessity." *Aiello, supra* at 798-799.

The policy of denying sick-leave benefits for all childbirth-caused disabilities may make administrative burdens lighter, but other values must be considered. It is true that some may take advantage of the benefits. This applies to every illness or injury. It cannot be the basis for refusing sick-leave benefits for

all childbirth-caused disabilities. To do so is discrimination. It has been said:

"The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

"Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." Stanley v. Illinois, 405 U.S. 645, 657, 92 S.Ct. 1208, 1215, 31 L.Ed. 551 (1972).

The administrative machinery to process leaves granted for other illnesses is in existence. These administrative procedures can readily be adapted to apply to pregnancy cases. The plaintiff has met her burden of demonstrating that the balance of hardships weighs in her favor. Green v. Waterford Board of Education, 473 F.2d 629 (2nd Cir. 1973); Bravo v. Board of Education of City of Chicago, 345 F.Supp. 155 (N.D. Ill.E.D. 1972); Williams v. San Francisco

Unified School District, 340 F.Supp. 438 (N.D. Cal. 1972). Pregnancy-related disabilities cannot be excluded because of the cost of adding these benefits.

VIII

CONCLUSION

To defendants' intentional violation of Title VII the only defense urged is a good-faith reliance on administrative interpretation. I find this to be insufficient. In the Civil Rights Act of 1964, the term "intentional" means that defendants intended to do what they did, not that there was a willful and deliberate intention to violate the law. Kober v. Westinghouse Electric Corp., 480 F.2d 240, 246 (3rd Cir. 1973). Defendants have intentionally engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964. They have discriminated on the basis of sex by denying sick-leave benefits for childbirth-related disabilities.

Plaintiff has also shown a violation of the Equal Protection Clause of the Fourteenth Amendment. In determining sick leave benefits, defendants' distinction between childbirth-caused disabilities and other medical disabilities is arbitrary and irratonal. The distinction serves no legitimate interest of the Board of the Schocl District. It penalizes the female teacher for asserting her right to bear children. Accordingly, it is

Ordered that:

1) Defendant Lake Oswego School District No. 7 is dismissed.

2) Defendants are guilty of an Unfair Labor Practice Under the Title VII of the Civil Rights Act of 1964.

3) Defendants' refusal to grant plaintiff the use of her accrued sick leave for her pregnancy-related disability was an invidious discrimination on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

4) Defendants shall grant plaintiff sick leave benefits.

5) Defendants and their successors in office, agents, and employees are enjoined from refusing to grant sick leave for pregnancy-related disabilities.

6) Plaintiff is awarded costs and reasonable attorneys fees under the provisions of 42 U.S.C. § 2000e-5(k). Plaintiff is to submit to the Court a time sheet and affidavit setting forth a statement by plaintiff's attorney of the time expended in preparation of this action.

7) Plaintiff shall submit a form of Judgment Order.

The foregoing shall constitute findings of fact and conclusions of law pursuant to Fed.R.Civ.P.52(a).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BARBARA R. HUTCHISON,
Plaintiff-Appellee, Cross-Appellant,

vs.

LAKE OSWEGO SCHOOL DISTRICT NO. 7, DR. THOMAS COTTLE, EDWARD ALLEN, SAMUEL H. MELROSE, JR., GARRY R. BULLARD, and JAMES S. PUTNAM, in their capacities as members of the LAKE OSWEGO SCHOOL DISTRICT BOARD,
Defendants-Appellants, Cross-Appellees.

No. 74-3181
No. 74-3182

OPINION

[July 21, 1975]

Appeal from the United States District Court
for the District of Oregon

Before: KOELSCH and CARTER, Circuit Judges,
and SCHNACKE,* District Judge.

JAMES M. CARTER, Circuit Judge:

Defendants Lake Oswego School District Board ("the school board") and its individual members appeal from the judgment of the district court, enjoining the school board from refusing to grant sick leave benefits for absence due to childbirth, and awarding plaintiff Hutchison lost wages, costs, and attorney's fees against the school board and its individual members. Hutchison, on the other hand, appeals from the district court's dismissal of the Lake Oswego School District No. 7 ("the school district") on Eleventh Amendment grounds. We affirm in part and reverse in part.

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*Honorable Robert H. Schnacke, United States District Judge, Northern District of California, sitting by designation.

Hutchison was employed for two school years by the school district as a part-time junior high school teacher. On January 27, 1973, she gave birth to a child, necessitating her absence from work for 15 working days. She suffered no complications as a result of either her pregnancy or childbirth. Upon her return to work, she requested that she be allowed sick leave benefits for her absence—she had accrued 15 days sick leave at that time.

The school board refused her request on the basis of § 415.1 of the school district's Policies and Procedures and Ore. Rev. Stat. § 342.595, both providing for a minimum amount of sick leave for "illness or injury." Pregnancy was not deemed to be an "illness or injury" but rather a temporary disability permitting leave without pay. This interpretation was rendered by the superintendent of the Lake Oswego Schools and concurred in by the Director of Legal and Executive Services for the Oregon State Department of Education. The sum of $339.59 was deducted from Hutchison's wages because of her absence from her job and the necessity of hiring a replacement during her absence.

After exhausting all possible administrative remedies, she brought the present suit seeking a declaration that the school district's maternity leave policy constituted sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). She also sought damages under 42 U.S.C. § 2000e-5(g), and attorney's fees under 42 U.S.C. § 2000e-5(k).

The case was submitted without trial on the briefs and certain stipulated facts. The district court dismissed the school district on the basis of sovereign immunity, but found that the school board and its individual members had engaged in unlawful sex discrimination in violation of both the Equal Protection Clause and Title VII.

The defendants contend on appeal that: the refusal to grant sick leave benefits for normal pregnancy violates neither the Equal Protection Clause nor Title VII; the recovery of back pay and attorney's fees from the individual school board members is barred by the doctrine of qualified immunity for acts done in good faith and within the scope of their official duties; and such recovery against the school board is barred by the Eleventh Amendment. Hutchison contends that the doctrine of sovereign immunity was improperly applied to the school district.

EQUAL PROTECTION

The decision of the district court was rendered prior to the Supreme Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), which held that the State of California was not required by the Equal Protection Clause to provide for absences due to normal pregnancy and childbirth under its state disability benefits plan. The Court stated that the State has a legitimate interest in "distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately." *Id.* at 496. And with respect to the contention that discrimination on the basis of pregnancy constitutes "invidious discrimination" for purposes of equal protection, the Court stated:

> "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Id.* at 496-497 n.20.

The operation of Oregon's sick leave benefits plan differs somewhat from California's disability benefits plan, and, unlike the *Geduldig* defendant, the defendants in the present case did not make a strong showing below that the exclusion of normal pregnancy from the sick leave policy was necessitated by the increased administrative burden and cost of including such pregnancy. However, we hold that *Geduldig* dictates a similar result in the present case.

Hutchison has not suggested that the policy is a mere pretext designed to effect an invidious discrimination. And inclusion of normal pregnancy in the school district's sick leave plan would unquestionably "be substantially more costly than the present program and would inevitably require state subsidy, a higher rate of

employee contribution, a lower scale of benefits . . . , or some combination of these measures." *Geduldig, supra,* at 495-496. We hold that Hutchison cannot validly base her claim on the Equal Protection Clause.

TITLE VII

The defendants concede that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, is applicable to the employment practices of the school board, and that the policy in issue is an "employment practice" within the meaning of Title VII. However, they rely upon Footnote 20 of *Geduldig, supra,* to support their contention that discrimination on the basis of pregnancy is not sex discrimination. But the defendants have greatly overstated the reach of *Geduldig* in general and Footnote 20 in particular.

First, the school district cites Footnote 20 as if it states that discrimination on the basis of pregnancy is *never* sex-based. That is not what the Footnote provides. Rather, it states that not *every* legislative classification concerning pregnancy is sex-based.

Second, in *Geduldig* the Court was considering whether such classification violated the Equal Protection Clause. Title VII was not at issue. The school district contends that since the threshold question under Title VII is whether or not there has been discrimination on the basis of sex, and since the Supreme Court in *Geduldig* has stated that exclusion of pregnancy benefits under a state disability plan is not sex-based, the Court decided the Title VII issue sub silentio.

Title VII, however, unlike the Equal Protection Clause, proscribes classifications which "*in any way* would deprive *or tend to deprive* any individual of employment opportunities *or otherwise adversely affect* [her] status . . . ." (Emphasis added.)[1] This

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[1]Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides in pertinent part:

> "It shall be an unlawful employment practice for an employer—
>
> (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . or
>
> (2) . . . classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . ."

language certainly is conducive to an interpretation different from that premised upon the language of and cases interpreting the Equal Protection Clause. "In this posture our case is one of statutory interpretation rather than one of constitutional analysis. On this distinction alone we believe appellant's reliance upon [*Geduldig*] is misplaced." *Wetzel v. Liberty Mutual Ins. Co.*, 511 F.2d 199, 203 (3 Cir. 1975), *cert. granted*, 43 U.S.L.W. 3624 (5/27/75).

To effectuate the goals of Title VII, Congress entrusted the promulgation of regulations or guidelines thereunder to the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-4. The guidelines so promulgated are the agency's interpretation of the statute and indicate what are or are not proscribed discriminatory practices. *Wetzel, supra*, 511 F.2d at 204. These EEOC guidelines are entitled to "great deference" with respect to the proper interpretation of Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The EEOC guideline applicable to the school board's sick leave policy in the present case unequivocally provides that the exclusion of pregnancy or childbirth related disabilities from sick leave coverage is a violation of Title VII.[2] Unless "application of the guideline would be inconsistent with an obvious congressional intent not to reach the employment practice in question", the school board's sick leave policy must be deemed to be violative of Title VII. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

In enacting Title VII, Congress intended to eliminate all discriminatory employment practices, H. Rep. No. 914, 1964 U.S. Code Cong. & Admin. News 2401, including discriminatory treatment of men and women. *See Sprogis v. United Air Lines, Inc.*,

[2] 29 C.F.R. § 1604.10(b) provides:

"Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

444 F.2d 1194, 1198 (7 Cir.), *cert. denied*, 404 U.S. 991 (1971).[3] Clearly, a sick leave policy which excludes from coverage absences related to pregnancy or childbirth adversely and disparately affects women with respect to employment benefits. This interpretation is in no way inconsistent with the language of Title VII or congressional intent to eliminate all employment practices which discriminate on the basis of sex. In fact, "over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications." *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973). *See also* 1972 U.S. Code Cong. & Admin. News 2137 (House Report concerning sex discrimination and the 1972 amendments to Title VII).

In *Sprogis, supra*, it was stated with respect to Title VII: "The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. Discrimination is not to be tolerated under the guise of physical properties possessed by one sex . . . or through the unequal application of a seemingly neutral company policy." 444 F.2d at 1198. We decline to ratify such discrimination under the facts of this case and in light of a reasonable EEOC guideline specifically proscribing the exclusion of pregnancy from sick leave coverage.

In the proceedings below, the defendants placed all of their "eggs" in the Footnote 20 "basket". On appeal they contend that the exclusion of childbirth from their sick leave policy is justified because pregnancy is voluntary and is not an "illness or injury", and because of the administrative burden and cost engendered by adding pregnancy and childbirth related disabilities to the sick leave coverage. In support of this latter defense, they cite statistics in the Brief of Amicus Curiae American Telephone and Telegraph Company.

We do not consider factual and legal defenses raised for the first time on appeal. We do note, however, that administrative costs which might justify an employment practice for purposes of equal protection would not necessarily constitute an adequate

[3] "The scope of Section 703(a)(1) is not confined to explicit discriminations based 'solely' on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Sprogis, supra*, 444 F.2d at 1198.

defense under Title VII. Further, we must assume that the EEOC was aware of the increased costs that would be required in order to comply with its guidelines. And finally, those circuit courts and the majority of district courts which have considered the defenses raised by the school district have held them to be without merit. *See, e.g., Wetzel, supra,* at 206: "Under Liberty Mutual's policy, all disabilities are covered. We believe that an income protection plan that covers so many temporary disabilities but excludes pregnancy because it is not a sickness discriminates against women and cannot stand." *See also Gilbert v. General Electric Co.,* ..... F.2d ___, 44 U.S.L.W. 2013 (4 Cir. June 27, 1975); *Farkas v. South Western City School Dist.,* 506 F.2d 1400 (6 Cir. 1974), *aff'g* 8 FEP Cases 288 (S.D. Ohio 1974); *Vineyard v. Hollister School Dist.,* 64 F.R.D. 580, 585 (N.D. Cal. 1974); *Sale v. Waverly-Shell Rock Bd. of Educ.,* 390 F.Supp. 784, 788 (N.D. Iowa 1975).

ELEVENTH AMENDMENT—SOVEREIGN IMMUNITY

In *Edelman v. Jordan,* 415 U.S. 651 (1974), the Supreme Court held that retroactive welfare payments awarded against the Illinois Department of Public Aid were barred by the Eleventh Amendment, proscribing monetary awards against a State. In the present case, the district court awarded Hutchison sick leave benefits, costs, and attorney's fees under 42 U.S.C. § 2000e-5(k) against the school board and its individual members, but dismissed the school district. The defendants contend that *Edelman, supra,* bars an award of back pay or attorney's fees against either the school district or school board. We disagree.

The most important factor in determining whether a particular agency is the "alter ego" of the State for Eleventh Amendment purposes is "whether payment of a judgment will have to be made out of the state treasury, i.e., whether the fund in question has both the independent power and resources to pay the judgment without further action by the state legislature or other governmental officer." *Bowen v. Hackett,* 387 F.Supp. 1212, 1221 (D.R.I. 1975). Also important to our decision are the following factors: performance by the entity of an essential government function, ability to sue or be sued, power to take property in its own name or in the name of the State, and corporate status of the entity. *George B. Whitton, Jr., Inc. v. State University Construction Fund,* 493 F.2d 177 (1 Cir. 1974).

The autonomous nature of school districts (and their administrative arms, the district school boards) in Oregon with respect to the factors noted above is evident from a reading of the relevant Oregon statutory provisions. Of primary importance is the fact that most of a school district's financing comes from local and not state-wide sources. Although the State does aid the various school districts, the amount is based upon the number of resident students and may not be used as an offset to the school district's own tax levy. Ore. Rev. Stat. § 327.090.[4] Therefore, the Lake Oswego School District has the *power* to obtain funds to satisfy a monetary judgment, and is precluded from applying *State* funds to offset such a levy. A set amount of State aid is awarded each year on the basis of the number of students, an amount which would not be altered by the back pay award in the present case.

With respect to the other relevant factors, school districts are "bodies corporate", § 332.072,[5] and the district school boards may sue and be sued, § 332.072, may condemn property for school purposes, § 332.182,[6] and may contract indebtedness, § 328.565.[7] We

[4] "327.090 Apportionments as revenue; limitation on use. The amount to be received from the Basic School Support Fund shall be included as revenue in the budget of each school district. No part of such fund shall be apportioned and distributed to apply as an offset to a school district tax levy."

[5] "332.072 Legal status of school districts. All school districts are bodies corporate, and the district school board is authorized to transact all business coming within the jurisdiction of the district and to sue and be sued. Pursuant to law, district school boards have control of the district schools and are responsible for educating children residing in the district."

[6] "332.182 Condemnation of realty for school purposes. (1) Whenever it is necessary for any school district to acquire any real property for necessary school purposes, and the owner of the real property and the district school board cannot agree upon the price to be paid therefor, and the damage for the taking thereof, if any, the district school board may commence and prosecute any necessary or appropriate action for the condemnation of the real property required for school purposes. The title acquired by any school district by any such action shall be a fee simple title.

(2) The procedure for condemnation shall be the procedure provided by law for condemnation of land or rights of way by public corporations or quasi-public corporations for public use or for corporate purposes."

[7] "328.565 Power to create indebtedness for current expenses and bond retirement; limitation. (1) Any district school board may con-

hold that the analysis of the court in the recent case of *Gordenstein v. The University of Delaware*, 381 F.Supp. 718, 722-723 (D. Del. 1974), is equally applicable to the school district and school board in the present case:

> "Since the state treasury is insulated from a judgment in the plaintiff's favor, since the University has both the funds and the legal power to satisfy such a judgment, and since under Delaware law the University is an independent corporation exercising virtually complete fiscal and educational autonomy, this Court concludes that the University is not an arm or alter ego of the State of Delaware under the Eleventh Amendment and therefore is not immune from suit. The fact that the University may be assisting the State of Delaware in the performance of a governmental function is not determinative." (Citations omitted.)

Our holding that neither the school district nor the school board as a body is immune from suit obviates the necessity of deciding two additional contentions raised by Hutchison: (a) that even if this is deemed to be a suit against the State, attorney's fees may be awarded in conjunction with the granting of prospective injunc-

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tract indebtedness by the issuance of warrants or short-term promissory notes for the purpose of meeting current expenses, retiring outstanding bonds or warrants, or paying the interest thereon, whenever provision therefor has been made in its duly adopted budget. In the exercise of the authority given in this subsection, the district school board may contract or refund short-term loans which shall at no time exceed in the aggregate 80 percent of the ad valorem taxes upon real and personal property theretofore levied and remaining uncollected for such school district for the tax year in which the warrants or notes are issued and 80 percent of other budgeted and unpledged revenues which the district school board estimates will be received from other sources during such tax year.

(2) A district school board may, at its option, borrow moneys pursuant to this section or ORS 287.402 to 287.432."

Such indebtedness may be paid by means of a *district-wide* tax levy:

"328.555 Property liable for district indebtedness; tax levy. (1) All taxable property in a school district at the time any indebtedness is incurred by such district and all taxable property subsequently located in the area comprising such district shall be liable to taxation for the payment of such indebtedness until paid."

tive relief;[8] and (b) that the states in ratifying the Thirteenth and Fourteenth Amendments *consented* to Congress' authority under the enabling clauses of those Amendments to make state and local governments amenable to suit in federal court by individual employees.[9]

QUALIFIED IMMUNITY OF INDIVIDUAL SCHOOL BOARD MEMBERS

Finally, the individual members of the school board contend that they are protected by a qalified "good-faith" immunity from liability for damages. We agree. In *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974), the Supreme Court stated: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Recently, this qualified immunity was extended to school board members acting in good faith. *Wood v. Strickland*, ... U.S. ....., 43 U.S.L.W. 4293 (February 25, 1975). The Court stated: "The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice." *Id.* at 4298.

Although the Court was dealing with student discipline in *Wood*, the principles enunciated are equally applicable in the present cir-

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[8]This contention finds support in the recent cases of *Souza v. Travisono*, ___ F.2d ___, 43 U.S.L.W. 2402 (1 Cir. 3/11/75), and *Downs v. Department of Public Welfare*, ... F.Supp. ....., 43 U.S.L.W. 2270 (E.D. Pa. 12/20/74). In *Downs* the court held that "an award of counsel fees is both clearly remedial and an integral part of a decree providing prospective relief from violations of federal statutory and/or constitutional rights." Since such fees are incidental to prospective injunctive relief, are necessary to the future compliance with federal law (private attorney general theory), and have a minimal impact on the State treasury, "the Eleventh Amendment does not bar an order directing individual defendants to satisfy an award of attorneys fees from state funds." *Id.* at 2271. *See also Jordan v. Fusari*, 496 F.2d 646, 651 (2 Cir. 1974); *Class v. Norton*, 505 F.2d 123, 126 (2 Cir. 1974).

[9]*But see generally Skehan v. Board of Trustees, Bloomsburg State College*, 501 F.2d 31, 42-43 n.7 (3 Cir. 1974); *Jordan v. Gilligan*, 500 F.2d 701, 708-710 (6 Cir. 1974).

cumstances. The school board members did not disregard "settled, indisputable law" since the courts themselves have been split as to whether or not pregnancy may permissibly be excluded from sick leave coverage. The school board specifically asked the State Director of Legal and Executive Services for a ruling on the issue and acted in reliance thereon. Although we conclude that the school board's exclusion of pregnancy and childbirth related disabilities from sick leave coverage violated Title VII, the board members clearly acted in good faith and within their official capacities and are therefore entitled to qualified immunity from the payment of damages.

We affirm that portion of the district court's judgment and opinion finding that the Lake Oswego School District Board's sick leave policy violates Title VII, enjoining exclusion of pregnancy and childbirth related disabilities from the plan and awarding back pay, costs, and attorney's fees against said Oswego School District Board. We reverse the judgment and opinion so far as it dismisses the Lake Oswego School District No. 7 and holds liable the individual school board members for back pay, costs, and attorney's fees, and we direct that judgment be entered for Hutchison and against Lake Oswego School District No. 7, jointly and severally with Lake Oswego School District Board, for back pay, costs and attorney's fees; finally, we reverse that portion of the judgment and opinion finding the sick leave policy to be in violation of the Equal Protection clause of the Fourteenth Amendment.

The cause is remanded for entry of judgment accordingly.

SCHNACKE, District Judge (concurring and dissenting).

I agree that defendants' conduct does not violate the Equal Protection Clause. But I do not believe it violates Title VII either.

The Supreme Court, in *Geduldig v. Aiello*, 417 U.S. 484, 496-497, incl. fn. 20, stated:

> "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. . . . Normal pregnancy is an objectively identifiable physical condition with unique characteristics. . . . The

> program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes . . . There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."

The Court was clearly saying that any discrimination in California's program was not because of sex and that any adverse effect the program's classifications had on plaintiffs there was not in any way due to their sex. A program with such characteristics would not involve illegal sex bias under Title VII [see 42 U.S.C. §2000e-2(a)], and the school district's sick leave plan is such a program. Plaintiff here has not suggested that the district's "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other" [see *Geduldig v. Aiello, supra* at fn. 20]. On the contrary, the district simply made a reasonable, good faith decision to cover only "illness or injury" in their program and, on good authority, determined that pregnancy is not an illness or injury. (The California program also covered only illnesses and injuries.)

Thus, there are compelling indications that the EEOC guidelines are wrong in treating the district's pregnancy exclusion as a Title VII violation, so that courts need not defer to them on this point [*Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973)].

Since I do not think plaintiff here has any claim on which a federal court may grant her relief, I express no opinion as to whether the Eleventh Amendment bars non-injunctive relief against defendants school district and school board or whether defendant school board members are individually liable for damages.

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APPENDIX C

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

July 21, 1975

Re: Nos. 74-3181 and 74-3182 Barbara R. Hutchinson v. Lake Oswego School District No. 7, etc., et al.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered affirming in part, reversing in part and remanding the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Emil E. Melfi, Jr.
Clerk
U. S. Court of Appeals

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARBARA R. HUTCHISON Plaintiff-Appellee, Cross-Appellant, v. LAKE OSWEGO SCHOOL DISTRICT NO. 7, DR. THOMAS COTTLE, EDWARD ALLEN, SAMUEL H. MELROSE, JR., GARRY R. BULLARD, and JAMES S. PUTNAM, in their capacities as members of the LAKE OSWEGO SCHOOL DISTRICT BOARD Defendants-Appellants Cross-Appellees	)	No. 74-3181 No. 74-3182 REQUEST FOR ATTORNEYS FEES

Barbara R. Hutchison, through her attorney, Carol A. Hewitt of Lindsay, Nahstoll, Hart, Dafoe & Krause, hereby requests the court to award her attorneys fees in the appeal of this case from the District Court.

In support of this request, Barbara R. Hutchison, relies on Title VII of the Civil Rights Act of 1964, as

amended (42 U.S.C. §2000e-5) and the attached affidavit of Carol A. Hewitt.

Dated this 29th day of July, 1975.

LINDSAY, NAHSTOLL, HART, DAFOE & KRAUSE

By /s/ Carol A. Hewitt

Attorney for Plaintiff-Appellee, Cross-Appellant

AFFIDAVIT IN SUPPORT OF REQUEST FOR ATTORNEYS FEES

STATE OF OREGON)
) ss
County of Multnomah)

I, CAROL A. HEWITT, being first duly sworn, depose and say that the following is a true and accurate account of the activities and time spent on behalf of Barbara R. Hutchison, Plaintiff-Appellee, Cross-Appellant in the above matter:

Filing of notice of Cross Appeal and security for costs; drafting of Motion and Order for Oral Argument in Portland, Oregon, legal research re issues on appeal including official immunity, application of eleventh amendment

and recent decisions under Title VII and the fourteenth amendment; review of appellants' opening brief; drafting and completion of answering brief and brief on cross appeal, review of appellant's reply brief, preparation for oral argument, oral argument in San Francisco.

Total hours 76.4

The normal charge of my firm for these services would be at the rate of $50.00 per hour, for a total of $3,820.00.

/s/ Carol A. Hewitt

[JURAT]

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARBARA R. HUTCHISON Plaintiff-Appellee, Cross-Appellant, v. LAKE OSWEGO SCHOOL DISTRICT NO. 7, DR. THOMAS COTTLE, EDWARD ALLEN, SAMUEL H. MELROSE, JR., GARRY R. BULLARD, and JAMES S. PUTNAM, in their capacities as members of the LAKE OSWEGO SCHOOL DISTRICT BOARD Defendants-Appellants Cross-Appellees	)	No. 74-3181 No. 74-3182 COST BILL

The Court having entered judgment in this case on July 21, 1975, against Lake Oswego School District No. 7 and the Lake Oswego School District Board, the Clerk is requested to tax the following as costs:

BILL OF COSTS

Fees and disbursements for photocopying and binding brief on appeal	$325.95

STATE OF OREGON)
) ss
County of Multnomah)

I, CAROL A. HEWITT, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Jack L. Kennedy and Robert M. Greening, Jr., attorneys for Defendants-Appellants, Cross-Appellees, with postage fully prepaid thereon.

/s/ Carol A. Hewitt
Attorney for Plaintiff-Appellee, Cross-Appellant

[JURAT]

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARBARA R. HUTCHISON Plaintiff-Appellee, Cross-Appellant, v. LAKE OSWEGO SCHOOL DISTRICT NO. 7, DR. THOMAS COTTLE, EDWARD ALLEN, SAMUEL H. MELROSE, JR., GARRY R. BULLARD, and JAMES S. PUTNAM, in their capacities as members of the LAKE OSWEGO SCHOOL DISTRICT BOARD, Defendants-Appellants, Cross-Appellees.	)	No. 74-3181 No. 74-3182 ORDER ON ATTORNEY'S FEES AND COSTS

Before: KOELSCH, CARTER and SCHNACKE.

IT IS ORDERED that costs be granted to defendants-appellants, cross-appellees (the School District and individual members of the Board) in the sum of $137.65.

IT IS FURTHER ORDERED that as to Barbara R. Hutchison, the plaintiff-appellee, cross-appellant, costs and attorney's fees be denied.

FILED: October 29, 1975.

In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-1049

BARBARA R. HUTCHISON,

Petitioner,

v.

LAKE OSWEGO SCHOOL DISTRICT NO. 7, DR. THOMAS COTTLE, EDWARD ALLEN, SAMUEL H. MELROSE, JR., GARRY R. BULLARD and JAMES S. PUTNAM, in their capacities as members of the LAKE OSWEGO SCHOOL DISTRICT BOARD,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACK L. KENNEDY
1402 Standard Plaza
Portland, Oregon 97204
Attorney for Respondents

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-76

In the Supreme Court

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REASONS FOR DENYING THE WRIT

I

It is a matter of discretion whether to allow attorneys fees.

A party is generally not entitled to an award of attorneys fees as a matter of right. *Alyeska Pipeline Service Co.* v. *The Wilderness Society*, 95 S. Ct. 1612 (1975). Section 706(k) of Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5 (k), provides that ". . . the court, *in its discretion, may* allow the prevailing party . . . a reasonable attorney's fee as part of the costs. . . ." (Emphasis added). The statute is permissive and allows the court to consider the circumstances of each case in deciding when to award fees.

II

The Court of Appeals acted properly in denying an award of attorneys fees.

Petitioner prevailed in her action in district court against the school board and its individual members on claims of violations of her rights under the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. The only issue on which she did not prevail concerned the immunity of the School District. She was awarded attorneys fees.

Respondents appealed to the Court of Appeals for the Ninth Circuit and petitioner cross-appealed. The Court of Appeals ruled in favor of respondents that the Equal Protection Clause had not been violated and that the individual school board members had acted in good faith and were therefore immune from liability. It ruled in favor of petitioner that the School District was subject to liability. Thus, respondents prevailed in part and petitioner prevailed in part. Under these circumstances the Court of Appeals acted reasonably

and did not abuse its discretion in denying petitioner an award of attorneys fees on appeal. See *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 and fn. 5 (9th Cir. 1972).

Petitioner contends that the purposes of Title VII will be frustrated if she is denied attorneys fees on appeal citing this Court's decision in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). *Newman* was a racial discrimination case under Title II involving a sandwich shop and five drive-in restaurants. The district court found prohibited discrimination as to the sandwich shop but not as to the drive-in restaurants. The Court of Appeals went beyond the district court and also found prohibited discrimination as to the restaurants. Thus, unlike the present case, plaintiff in *Newman* was clearly the prevailing party both in the district court and on appeal.[1]

The Court of Appeals in *Newman* remanded the case to the district court for consideration of an award of attorneys fees, but only to the extent that the district court found the defenses advanced were for the purpose of delay and in bad faith. This Court stated that such a standard for an award of attorneys fees

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[1] There is no conflict among the Circuits. In each of the other cases relied upon by plaintiff the party who was awarded attorneys fees was clearly the only "prevailing" party or the matter of attorneys fees for the appeal was not discussed. *Lowry* v. *Whitaker Cable Corp.*, 472 F.2d 1210 (8th Cir. 1973) (defendant appealed and lost); *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) (no discussion); *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (no discussion); *Berg* v. *Richmond Unified School Dist.*, 11 F.E.P. Cases 1285 (9th Cir. 1975) (defendant appealed and lost); *Palmer* v. *Rogers*, 10 E.P.D. ¶ 10,499 (D. D.C. 1975) (plaintiff appealed and won).

is not proper and held that ". . . one who succeeds in obtaining an injunction under [Title II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. . . ." The writer of the per curiam opinion noted that *Newman* was "not even a borderline case" because the defenses advanced there were "patently frivolous" and denial of attorneys fees would have been "manifestly inequitable." 390 U.S. at 402 and fn. 5.

It would not be "manifestly inequitable" in this case to deny petitioner an award of attorneys fees on appeal. Petitioner has already been granted an award of attorneys fees in the district court and, therefore, the purposes of Title VII will not be frustrated by denying her an additional award on appeal. Moreover, respondents' defenses were not patently frivolous and were well taken on appeal. Respondents obtained substantial relief in the Court of Appeals.[2]

At the very least this case presents special circumstances or is borderline. It does not present a question of national importance, nor is there a conflict among the Circuits so as to justify review by this Court.

III

The Court of Appeals properly denied costs to petitioner and awarded costs to respondents.

Petitioner would have this Court review this case

[2] It is not "irrelevant," as plaintiff contends, that the judgment against the individual defendants was reversed on appeal.

to establish a rule that would require an award of costs on appeal to the party who obtained a judgment in the district court if the judgment is affirmed in any respect. Such a rule has not been followed in the Circuits, nor would such a rule be proper.

Section 706(k) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), gives the court discretion to allow costs to the prevailing party. Where a party to an appeal obtains substantial relief, in whole or in part, or where the party has performed a useful service in bringing the matter before the Court of Appeals, the Circuits have followed a rule that the court may award costs to that party or may divide costs equally. *Environmental Defense Fund, Inc.* v. *Callaway*, 497 F.2d 1340, 1342 (8th Cir. 1974); *Newman* v. *Stein*, 464 F.2d 689, 698 (2d Cir. 1972); *Graham* v. *Texas Gulf Sulphur Company*, 457 F.2d 418, 427-28 (5th Cir. 1972); *Merrill* v. *Builders Ornamental Iron Co.*, 197 F.2d 16, 26 (10th Cir. 1952). Such a rule is proper and was correctly applied in this case by the Court of Appeals.

CONCLUSION

For the foregoing reasons, this is not an appropriate case for review and the petition for writ of certiorari should be denied.

Respectfully submitted,

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1402 Standard Plaza
Portland, Oregon 97204
Attorney for Respondents